Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-858 and 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellees, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move this Court to dismiss this appeal or, in the alternative, to

affirm the judgment of the statutory three-judge court, sitting in the United States District Court for the Southern District of New York, on the ground that it is manifest that questions on which the decision of the cause depends, have been foreclosed by prior decisions of this Court, and are so unsubstantial as not to need further argument.

Statute Involved

This appeal involves the constitutional validity of certain provisions of the New York Attachment Statute which is contained in Article 62 of the Civil Practice Law and Rules of the State of New York, the complete text of which is set forth in Appendix F of the Jurisdictional Statement of the Attorney General of the State of New York (37a to 49a).[1] The specific sections involved are §§ 6201 (4), (5) and (8); 6211 and 6223.[2]

Statement

A. The Statutory Scheme

The substantive question on this appeal involves the constitutional validity of the New York statutory scheme which permits the pre-judgment seizure of property and debts without notice and hearing and without granting to

[1] Appendix references made herein refer to the Appendix to the Jurisdictional Statement of the Attorney General.

[2] The pertinent provisions of §§6201 and 6211 are found at footnote 1 of the three-judge court opinion (13a; 383 F. Supp. at 644) and §6223 in the body thereof (8a; 383 F. Supp. at 648).

the defendant a meaningful opportunity to vacate an attachment granted ex parte and without prior notice.

§ 6201 inter alia provides that "[a]n order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled in whole or in part, or in the alternative, to a money judgment against one or more defendants" in eight different type situations. Subparagraphs 1, 2, 3 and 7 relate to securing jurisdiction over the defendant and subparagraph 6 relates to the wrongful possession of governmental property, and not having been considered by the three-judge court, are not involved in this appeal. The other three sub-paragraphs 4, 5 and 8 relate to various types of alleged fraud on the part of the defendant and are part of the specific subject matter of this appeal.

§ 6211 which is also the specific subject matter of this appeal, sets forth the required contents of the order of attachment and, provides inter alia "[a]n order of attachment may be granted *without notice* before or after service of summons and at any time prior to judgment" (Emphasis supplied).

§ 6212 (b) requires that the plaintiff "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment, whereas pursuant to § 6222 the defendant in order to discharge the attachment and release its property must "give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in

numerous holdings of the New York courts. Without exception they have ruled—for at least fifty years—that an attachment may not be vacated under § 6223 or its predecessors unless the papers upon which the attachment was based 'clearly indicate that the plaintiffs must ultimately fail.' • • •. The burden is on the defendant to establish that the plaintiff *cannot* succeed, • • •; and to demonstrate that the plaintiff has not established a cause of action, which permits attachment, • • •; and to establish that the attachment is unnecessary for the security of the plaintiff, [citing New York cases].

"Indeed under the decisions of New York courts, the merits of the action are irrelvant on a motion to vacate the attachment under § 6223—a construction which we believe is proper in the light of the strictly limited wording of the law." [citing New York cases].

While the District Court found these considerations to be dispositive, it found "other significant distinctions which place the case at hand within the *Fuentes* rather than the *Mitchell* zone since

> "In the case at hand, Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion (10a; 383 F. Supp. at 649-650 [and], [t]he questions of fraud alleged by Curtis in its motion for attachment are equally 'ill-suited' for preliminary ex-parte determination where, as here, the critical allegations of fraud, however detailed, are based on information and belief" (11a; 383 F. Supp. at 649-50).

ARGUMENT

This appeal presents no substantial question not previously decided by this Court. This Court's most recent decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* and its predecessors are controlling.

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, —— U.S. ——, 43 LW 4192 decided by this Court on January 22, 1975 should be dispositive of this case. There, this Court considered and held unconstitutional a not dissimilar Georgia garnishment statute which made "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment" 42 LW at 4194. In this decision you reaffirmed your decision in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) that "'[a]ny significant taking of property by the State is within the purview of the Due Process Clause.' 407 U.S. at 86 [and that] [b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment" 43 LW at 4193.

For the same reasons as in *Fuentes* this Court held the Georgia statute unconstitutional holding 43 LW at 4194:

> "Here, a bank account, surely a form of property, was impounded and absent, a bond put totally be-

yond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."[4]

In so holding that the Georgia statute was unconstitutional in violation of the Due Process Clause this Court held 42 LW at 4194 that it was not saved by the more recent decision in *Mitchell* v. *W. T. Grant Company,* 416 U. S. 600 (1974) upholding a Louisana sequestration Statute since among other things "[t]he Louisiana law also expressly entitled the debtor to an immediate hearing after seizure, and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued" and that under the Georgia statute precisely as in the New York statute *sub judice,* a sizable amount of money was frozen,

"and the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the

[4] The fact that under New York CPLR §6211 a prejudgment seizure without notice and hearing is based on a judge's order will not save a statute, which is otherwise constitutionally invalid for failure to provide an immediate and adequate post-attachment hearing requiring the creditor to prove the grounds upon which the attachment was granted or at least to establish probable cause therefor. The "clerk-judge distinction" is of little significance (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 43 LW at 4198, dissenting opinion of Mr. Justice Blackman).

creditor would be required to demonstrate at least probable cause for the garnishment."[5]

Mr. Justice Powell in his concurring opinion found "[t]he most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate post garnishment hearing" and in making "no provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact, nor any indication that the garnishor bears the burden of proving entitlement to the garnishment" 43 LW at 4196.

Likewise the challenged provisions of the New York Attachment Statute are unconstitutional in violation of the Due Process Clause since it makes *no* provision whatsoever for *any* hearing requiring the plaintiff to prove the grounds upon which the attachment was granted, and defers the requirement of such proof until the eventual

[5] In fact the Georgia statute actually affords the alleged debtor greater protection in certain respects than the New York statute since similar to the Louisiana statute upheld in *Mitchell* and the Florida and Pennsylvania statutes declared unconstitutional in *Fuentes,* the Georgia statute "requires plaintiff to file a bond in a sum double the amount sworn to be due" Ga. Code Ann. §46-102, 43 LW at 4193, whereas the New York statute CPLR §6212 (b) only requires the plaintiff to "give an undertaking in a total amount fixed by the court, but not less than two hundred fifty dollars" regardless of the amount of the attachment (see footnote 3, *ante* at p. 4). Of course "as a matter of constitutional principle, [a bond] is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind" (*Fuentes* v. *Shevin,* 407 U.S. at 83-84).

trial on the merits, which may be several years hence[6] and during such long delay, the seizure continues without abatement. "Due process requires that the State afford an opportunity for a prompt post-garnishment judicial hearing in which the garnishor has the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt" (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 43 LW at 4195, concurring opinion of Mr. Justice Powell).

The District Court applied *Mitchell* to the challenged provisions of the New York Statute (CPLR §§ 6201(4), (5) and (8) and § 6211) in the same manner as this Court most recently did to the Georgia Statute in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* to determine whether it could "squeeze through the narrow door of constitutionality left open in *Mitchell*, or remain out in the unconstitutional territory charted in *Fuentes*" (6a; 383 F. Supp. at 647). As this Court found "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana Statute" (43 LW at 4194), so the District Court found that "the New York provisions do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds 'upon which the writ issued' [and] the opportunity for such a hearing was critical to the holding in *Mitchell*, and its absence renders

[6] In the present situation the Order of Attachment was granted without notice or hearing on April 13, 1973, almost two years ago, the case has just recently been placed on the trial calendar by Curtis, which is almost another two years behind. Thus it will be almost three years from the time of the attachment until appellees receive their hearing on the merits which will enable them for the first time to seek to dissolve the attachment by putting Curtis to its proof, and during such entire period of time appellees have been deprived of their money amounting to $24,324.17.

New York's Statute fatally defective" (7a-8a; 383 F. Supp. at 648). Any doubt on this point was laid to rest by this Court in *North Georgia Finshing, Inc.* v. *Di-Chem, Inc.*, which is dispositive of this appeal, and the questions which the appellants' seek to present to this Court have thereby been foreclosed.

CONCLUSION

The challenged provisions of the New York Attachment Statute as found by the District Court are unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice. The questions on which decision of this cause depends have been foreclosed by prior decisions of this Court, and are so unsubstantial as not to need further argument. The judgment of the District Court should be affirmed or the appeal dismissed.

Dated: New York, New York
February 6, 1975

Respectfully submitted,

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